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No. 91-___

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In The

Supreme Court of the United States

October Term, 1991

SANDRA JEAN SMITH,

Petitioner

v.

UNITED STATES OF AMERICA

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is Antarctica a "foreign country" for the purposes of the Federal Tort Claims Act?

TABLE OF CONTENTS

Page

Question Presented for Review i

Opinions Below 2

Statement of Jurisdiction 2

Statute Involved 3

Statement of the Case 3

Reasons for Granting the Writ 4

The Ninth Circuit's Holding, that Claims Arising in Antarctica are Excluded by the FTCA's "Foreign Country" Exception, is Contrary to the Purpose and Intent of that Act 4

Conclusion 11

TABLE OF AUTHORITIES

Cases:

In re "Agent Orange" Product Liability Litigation, 580 F.Supp. 1242 (E.D.N.Y. 1984) 10
Beattie v. United States, 756 F.2d 91 (D.C. Cir. 1984) 5, 10
Brock v. United States, 601 F.2d 976 (9th Cir. 1979) ... 10

Brunette Machine Works, Ltd. v. Kockum Industries, Inc., 406 U.S. 706 (1972) 9
Ducey v. United States, 713 F.2d 504 (9th Cir. 1983) 10
EEOC v. Arabian American Oil Co., 113 L.Ed. 2d 274 (1991) 5, 8
Foley Bros. Inc. v. Filardo, 336 U.S. 281 (1949) 8
Lujan v. Defenders of Wildlife (U.S. docket 90-1424), *on review from*, 911 F.2d 117 (8th Cir. 1990) 5
McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963) 8
Sami v. United States, 617 F.2d 755 (D.C. Cir. 1979) ... 10
Smith v. United States, slip op. 16931 (9th Cir. Dec. 24, 1991), *aff'g*, 702 F.Supp. 1480 (D.Or. 1989) ..... *passim*
United States v. Spelar, 338 U.S. 217 (1949) 6

Statutes:

Death on the High Seas Act, 46 U.S.C. § 761 7
Federal Tort Claims Act,
28 U.S.C. § 1346(b) 3, 9, 10
28 U.S.C. § 1402(b) 8
28 U.S.C. § 2680(k) ..... *passim*
Public Vessels Act, 46 U.S.C. § 781 7
Suits in Admiralty Act, 46 U.S.C. § 745 7
28 U.S.C. § 1254(1) 2

Miscellaneous:

Hearings on S. 2690 Before a Subcomm. of the Senate Comm. on the Judiciary, 76th Cong., 3d Sess. (1940) ... 7
Tort Claims Against the United States: Hearings on H.R. 7236 before Subcomm. I of the House Judiciary Comm., 76th Cong., 3d Sess. (1940) 7

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

SANDRA JEAN SMITH, Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The Petitioner Sandra Jean Smith respectfully prays that a writ of certiorari issue to review the December 24, 1991, judgment and opinion of the United States Court of Appeals for the Ninth Circuit in the above-captioned proceeding.

OPINIONS BELOW

The opinion and judgment of the U.S. Court of Appeals for the Ninth Circuit of December 24, 1991, *Smith* v. *United States*, slip op. 16931 (9th Cir. Dec. 24, 1991), including the dissenting opinion of Judge Fletcher, will be reported at 953 F.2d 1116 (9th Cir. 1991) and is reprinted in the appendix hereto, at App. 1, infra.

The opinion and judgment of the U.S. District Court for the District of Oregon, Judge Frye, presiding, of January 6, 1989, was reported at 702 F. Supp. 1480 (D. Or. 1989), and is reprinted in the appendix, at App. 18, infra.

STATEMENT OF JURISDICTION

Petitioner seeks review of the opinion and judgment of the U.S. Court of Appeals for the Ninth Circuit of December 24, 1991. A Petition for Rehearing and Suggestion for Rehearing En Banc were both denied on that same date. *Smith* v. *United States*, 953 F.2d 1116, slip op. at 16933 (9th Cir. Dec. 24, 1991). The Supreme Court has jurisdiction to review cases from the federal Courts of Appeals by virtue of 28 U.S.C. § 1254(1) (1988).

STATUTE INVOLVED

The Federal Tort Claims Act, June 25, 1948, ch. 646, § 1346, 62 Stat. 933 (1948) (codified as amended at 28 U.S.C. § 1346(b) (1988)), excludes from its jurisdiction "[a]ny claim arising in a foreign country." *Id.* § 2680 (codified at 28 U.S.C. § 2680(k) (1988)).

STATEMENT OF THE CASE

The Petitioner, Sandra Jean Smith, is the widow of John Emmett Smith, and the duly appointed representative of his estate. Mr. Smith was a carpenter by trade, and was employed by ITT Antarctic Services, a firm which provides logistic support for U.S. operations in the Antarctic. Mr. Smith arrived at McMurdo Station, Antarctica, on October 27, 1986, and began work in building some structures at the Station, which is exclusively operated by the United States government.

On November 23, 1986, Mr. Smith and two companions took a recreational hike to a site near McMurdo Station. The party wandered off a marked route. Mr. Smith fell into a crevasse and was killed. The gravamen of Petitioner's suit against the United States, filed in the U.S. District Court in Portland, Oregon, on August 5, 1987, is that its agents, the civilian and military authorities which operate the McMurdo Station, failed to warn Mr. Smith of the dangers in deviating from flagged routes in any off-base travel.

The District Court, Frye, J., presiding, granted the United States's motion to dismiss the action on the ground

that the court lacked subject matter jurisdiction under the Federal Tort Claims Act. *Smith* v. *United States*, 702 F. Supp. 1480, 1482-83 (D. Or. 1989). The U.S. Court of Appeals for the Ninth Circuit affirmed. *Smith* v. *United States*, 953 F.2d 1116, slip op. 16931, at 16940 (9th Cir. Dec. 24, 1991).

REASONS FOR GRANTING THE WRIT

THE NINTH CIRCUIT'S HOLDING, THAT CLAIMS ARISING IN ANTARCTICA ARE EXCLUDED BY THE FTCA'S "FOREIGN COUNTRY" EXCEPTION, IS CONTRARY TO THE PURPOSE AND INTENT OF THAT ACT

The U.S. Court of Appeals held in the decision below, *Smith* v. *United States*, 953 F.2d 1116, slip op. 16931 (9th Cir. Dec. 24, 1991), that the United States has not waived immunity from suits brought for the government's acts or omissions in the Antarctic. *Id.* at 16934, 16940. The Court of Appeals concluded that Antarctica is a "foreign country" for the purposes of the Federal Tort Claims Act, 28 U.S.C. § 2680(k), the sole avenue by which the Petitioner may sue the United States for the wrongful death of her husband. Petitioner submits that the reasoning adopted by the Ninth Circuit defies precedent, perverts the clear language of the statute, and undermines the intent and purpose of the Federal Tort Claims Act (hereinafter "the Act" or "FTCA").

The issue raised by this Petition is of some moment, despite the novel geographic setting. The Ninth Circuit's holding that Antarctica is a "foreign country" under the FTCA -- thus barring jurisdiction under that Act -- is squarely contradicted by the D.C. Court of Appeals' earlier decision in *Beattie* v. *United States*, 756 F.2d 91 (D.C. Cir. 1984). Moreover, Petitioner believes that the Ninth Circuit's understanding of the rules of statutory interpretation (in cases where a law's extraterritorial application is at issue) runs counter to this Court's recent pronouncement in *EEOC* v. *Arabian American Oil Co.*, 499 U.S. ___, 113 L.Ed. 2d 274 (1991), as well as being implicated in the currently-submitted case of *Lujan* v. *Defenders of Wildlife* (U.S. docket no. 90-1424) (argued Dec. 3, 1991). Finally, given the intensification of U.S. activities in the Antarctic, claims for government negligence there are likely to increase, making this an important issue to be settled.

This Petition clearly satisfies the considerations of Rule 10 on its own merits. Petitioner does acknowledge that the pending decision in *Lujan* v. *Defenders of Wildlife* may also touch upon the underlying issue of the extraterritorial application of U.S. laws.[1] To the extent it might, Petitioner also seeks a summary remand of her case to the Ninth Circuit for further consideration in view of that holding.

1. The Ninth Circuit correctly notes that the FTCA does not define the term "foreign country" in 28 U.S.C. §

[1] The Petition in *Defenders of Wildlife* was granted for consideration of two questions: (1) the standing of Respondents to bring a claim under the Endangered Species Act (ESA), and (2) the application of the ESA's section 7 to government activities on the high seas and in foreign countries. *See Defenders of Wildlife* v. *Lujan*, 911 F.2d 117 (8th Cir. 1990).

2680(k). But instead of carefully reviewing the congressional intent of the "foreign country" exception of the FTCA, the Ninth Circuit blithely assumes that to conclude Antarctica is *not* a foreign country would "render two other provisions of the FTCA nonsensical and require us to create rules governing liability for tortious acts and omissions in Antarctica." *Smith* v. *United States*, slip op. at 16936. These illusory concerns will be addressed below, but what is important to note here is that the Ninth Circuit adopted a "mechanical jurisprudence," in the words of Justice Frankfurter in *United States* v. *Spelar*, 338 U.S. 217, 223 (1949) (Frankfurter, J., concurring), and simply ignored the standard canons of statutory interpretation in cases such as this.

The Ninth Circuit agreed with the District Court's ruling that Congress did not intend "to waive sovereign immunity for torts alleged to have been committed by government employees outside the territorial jurisdiction of the United States." *Smith* v. *United States*, slip op. at 16935. This is simply wrong. In the only case in which this Court considered the FTCA's "foreign country" exception, *United States* v. *Spelar*, 338 U.S. 217 (1949), this Court noted that Congress was "unwilling to subject the United States to liabilities depending upon the laws of a foreign power." *Id.* at 221. In other words, the Court in *Spelar* recognized that a claim under the FTCA could arise outside of the territory of the United States, *provided* that the government's act or omission did not occur in a place where another nation's tort law was in force. Antarctica is just such a place, as the majority in the decision below concluded. *Smith* v. *United States*, slip op. at 16934 ("Antarctica [is] a sovereignless

region without civil tort law").[2]

This interpretation of 28 U.S.C. § 2680(k) is bolstered by even a cursory examination of the legislative history. In 1940, language proposed before the Senate Judiciary Committee would have made the FTCA "applicable only to damages or injury occurring within the geographic limits of the United States, Alaska, Hawaii, Puerto Rico, and the Canal Zone."[3] In the same year, the House Judiciary Committee considered similar language that would have limited claims to those "arising in the United States or its territories."[4] Both of these proposals would have limited the FTCA to specific geographic areas. Because these proposals were rejected, it seems that Congress was *not* categorically denying claims arising outside of the territory of the United States. Instead, as stated above, Congress's concern was in ensuring that no claim would be subject to a foreign nation's tort law.

[2] The Ninth Circuit's decision also works a bizarre result insofar as a wrongful death claim against the United States arising just offshore the McMurdo Station *would* be actionable under the Death on the High Seas Act (DOHSA), ch. 111, § 1, 41 Stat. 537 (1920) (codified at 46 U.S.C. § 761 (1988)), through the Suits in Admiralty Act, ch. 95, § 4, 41 Stat. 525 (1920) (codified at 46 U.S.C. § 745 (1988)), and the Public Vessels Act, ch. 428, § 1, 43 Stat. 1112 (codified at 46 U.S.C. § 781 (1988)), while a claim arising on the Antarctic continent itself would be barred under the FTCA. There is no question that both places, to use the Ninth Circuit's words, are "sovereignless."

[3] *See Hearings on S. 2690 Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong., 3d Sess. 38, 65 (1940).

[4] *See Tort Claims Against the United States: Hearings on H.R. 7236 before Sucomm. No. 1 of the House Judiciary Comm.*, 76th Cong., 3d Sess. 3 (1940).

This was why the expression "foreign country" was used in the FTCA, and not a narrower specification of claims arising in the territory of the United States. As this Court recently reaffirmed in *EEOC* v. *Arabian American Oil Co.*, 499 U.S. ___, 113 L.Ed. 2d 274 (1991), legislation is presumed not to apply extraterritorially "'unless a contrary intent appears'." *Id.* at ___, 113 L.Ed. 2d at 282 (*quoting Foley Bros. Inc.* v. *Filardo*, 336 U.S. 281, 285 (1949)). But this Court in *Arabian American* went on to say that this rule of construction "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Id.* (*citing McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-22 (1963)). Because Antarctica is a place without a sovereign -- and thus not a "country" -- to allow claims to arise there under the FTCA would not violate the concerns stated by this Court in *Spelar* and *Arabian American*. The Ninth Circuit chose to disregard the clear language and legislative intent of the FTCA, as well as the rules set forth by this Court for its proper construction.

2. If allowed to go unreviewed, the Ninth Circuit's rationale for deciding that Antarctica is a "foreign country" under the FTCA will work substantial mischief.

For example, the court below seized on the venue provision of the FTCA, 28 U.S.C. § 1402(b) (1982) (a tort claim against the United States "may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred"), and concluded that

> "[w]hile Smith . . . is able to lay venue in her state of residence because it has a district court, venue would not exist if the plaintiff happened to reside outside of the United States. If we were to find that Antarctica is not a foreign country, a resident of New Zealand, or any other country, injured by the acts or omissions of a U.S. employee in Antarctica, would find sovereignty waived but no venue in which to proceed against the United States. It is unlikely that Congress intended to create a tort remedy in cases for which no venue exists."

Smith v. *United States*, slip op. at 16937-38 (footnotes omitted).

The Ninth Circuit has thus fashioned a new, and utterly unsupportable, canon of statutory construction which would presume that where Congress gives a right of action, it also lays a venue. This Court has consistently ruled that there have always existed situations "in which the federal courts have jurisdiction but there is no district in which venue is proper." *Brunette Machine Works, Ltd.* v. *Kockum Industries, Inc.*, 406 U.S. 706, 710 n.8 (1972). While such gaps should be closed wherever possible, *id.*, that does not mean that a statute should be construed to *deny* jurisdiction for one claimant, just because a differently-situated plaintiff might not find a proper venue. This is precisely what the Ninth Circuit accomplished in its ruling.

Likewise, the Ninth Circuit read the choice-of-law provision of the FTCA, 28 U.S.C. § 1346(b) (1988) (the statute imposes liability "in accordance with the law of the place where the act or omission occurred"), to indicate that Congress did not intend for the FTCA to apply to the Antarctic, which has no tort law of its own. *Smith* v. *United States*, slip op. at 16938. As discussed above, the clear intent of the "foreign country" exception was to prevent a suit arising from a place where a foreign tort law was in force.

The Ninth Circuit adopted the reasoning of Judge (now Justice) Scalia, dissenting in *Beattie* v. *United States*, that "the FTCA no more envisions suits for torts occurring in stateless foreign regions than it does suits for torts occurring in foreign sovereignties." 756 F.2d at 111 (Scalia, J., dissenting).

Petitioner maintains that the majority in *Beattie* (as well as the dissent in the court below) were right in holding that Antarctica presents "a situation *directly opposite* to the [Congress's express] fear of becoming entangled in foreign law, which produced the 'foreign country' exception." *Id.* at 105 (original emphasis). The Ninth Circuit worried that federal courts would be called-upon to "create substantive or choice-of-law rules governing liability for tortious acts and omissions in Antarctica." *Smith* v. *United States*, slip op. at 16939. To the extent that a *substantive* tort law would have to be fashioned, the Ninth Circuit's fears would be justified. But the FCTA, by its very terms, *see* 28 U.S.C. § 1346(b), directs the application of choice-of-law principles, and the federal courts have taken-up that challenge wherever necessary.[5]

The Ninth Circuit simply decided that it was too hard

[5] *See, e.g., Ducey* v. *United States*, 713 F.2d 504, 508 n.2 (9th Cir. 1983) (Nevada law was chosen over California law in wrongful death action arising from flash flood); *Sami* v. *United States*, 617 F.2d 755, 763 (D.C. Cir. 1979) (rejecting possibility that West German law would be applied to a claim brought for false imprisonment because such an application would conflict with "a strong public policy of the forum"); *Brock* v. *United States*, 601 F.2d 976, 978-80 (9th Cir. 1979) (accident occurring over the Columbia River on Bonneville Dam, where both Oregon and Washington exercised jurisdiction); *In re "Agent Orange" Product Liability Litigation*, 580 F. Supp. 1242, 1254-55 (E.D.N.Y. 1984) (rejecting Vietnamese law as unsuitable).

to apply those principles in this case. This abandonment of the choice-of-law analysis flatly contradicts the congressional intent of the FTCA. Nor was it a sufficient reason to deny jurisdiction here.

CONCLUSION

This Petition is apparently the first ever to squarely raise an issue of the legal consequences of U.S. activities in Antarctica. It also implicates important questions of statutory construction for laws with potential extraterritorial effect. For the foregoing reasons, this Petition ought to be GRANTED.

Respectfully submitted,

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Submitted: March 20, 1992

JAN

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SANDRA JEAN SMITH, *Plaintiff-Appellant,* v. UNITED STATES OF AMERICA, *Defendant-Appellee.*	No. 89-35088 D.C. No. CV-87-883-HF ORDER AND OPINION

Appeal from the United States District Court
for the District of Oregon
Helen J. Frye, District Judge, Presiding

Argued and Submitted
July 9, 1990—Portland, Oregon

Filed May 1, 1991
Opinion Withdrawn December 24, 1991
Opinion Filed December 24, 1991

Before: Alfred T. Goodwin, Betty B. Fletcher and
Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Goodwin; Dissent by Judge Fletcher

SUMMARY

Jurisdiction/Governmental Torts

Affirming a district court judgment dismissing an action for lack of subject matter jurisdiction, the court of appeals held that the FTCA does not apply to claims arising in Antarctica.

Appellant Sandra Jean Smith challenged the district court's Rule 12 dismissal of her FTCA action for the wrongful death of her husband. Smith's actions alleged negligent acts or omissions by the United States in Antarctica. The district court dismissed her claim under the "foreign country" exception to the Act.

[1] The court agreed with the district court's determination that the words "foreign country" are not self-defining and that Congress did not intend to waive sovereign immunity for torts alleged to have been committed by government employees outside the territorial jurisdiction of the United States. [2] Consequently, the court held that the FTCA does not apply to claims arising in Antarctica. To hold otherwise would render other provisions of the Act nonsensical and require the court to create rules governing liability for tortious acts and omissions in Antarctica.

[3] It was unlikely that Congress intended to create a tort remedy in cases, such as here, for which no venue existed. [4] A further indication that the FTCA was not intended to apply in Antarctica was the choice-of-law problem presented in extending the Act's provisions to that region. Antarctica has no tort law. [5] The court declined to adopt the D. C. Circuit's conclusion that because the Act leads the court to a place where there is no civil tort law to apply, the court must use its own choice-of-law rules to determine which law applies. The court instead agreed with the conclusion that this choice-of-law dilemma evidences that the FTCA no more envisions suits for torts occurring in stateless foreign regions than it does suits for torts occurring in foreign sovereignties. [6] While the court acknowledged that the United States conducts activity in Antarctica, it was not cited to any legislative history that suggests that the federal court should create substantive or choice-of-law rules governing liability for tortious acts and omissions in Antarctica. [7] Even if the court adopted the view that Antarctica is not a foreign country, it still could not

agree that the coverage of the FTCA extends to Antarctica. Congressional intent was far from explicit.

Judge Fletcher dissented, stating that the majority's approach causes it to overstate greatly the implications of construing Antarctica as something other than a foreign country and leads it to a conclusion inconsistent with the fundamental underpinnings of the FTCA.

COUNSEL

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ORDER

The opinion filed May 1, 1991, and appearing at 932 F.2d 791 (9th Cir. 1991) is withdrawn.

The panel has voted unanimously to deny the petition for rehearing. Judges Fletcher and Fernandez have voted to reject the suggestion for rehearing en banc, and Judge Goodwin so recommends.

The full court has been advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

OPINION

GOODWIN, Circuit Judge:

Sandra Jean Smith appeals the Rule 12 dismissal of her Federal Tort Claims Act (FTCA) action for the wrongful death of her husband. Smith's action alleged negligent acts or omissions by the United States in Antarctica. The district court dismissed her claim under the "foreign country" exception to the statute. *Smith v. United States*, 702 F. Supp. 1480 (D. Or. 1989). We affirm.[1]

I

"The United States, as a sovereign entity, is immune from suit unless it has consented to be sued." *Cominotto v. United States*, 802 F.2d 1127, 1129 (9th Cir. 1986) (citing *United States v. Mitchell*, 463 U.S. 206, 212 (1983)). Under the FTCA, the United States has consented to be sued for tort damages "caused by the negligent or wrongful act or omission of any employee of the Government. . . ." 28 U.S.C. § 1346(b) (1982). The FTCA, however, is a limited waiver of sovereign immunity under which certain categories of torts are specifically excluded. *See Grunnet v. United States*, 730 F.2d 573, 574-75 (9th Cir. 1984); 28 U.S.C. § 2680 (listing fourteen exceptions to section 1346(b)). Courts are without jurisdiction over any excluded claim. *See Cominotto*, 802 F.2d at 1129.

Under the FTCA, the United States retains sovereign immunity for "[a]ny claim arising in a foreign country." 28 U.S.C. § 2680(k). The central question in this case is whether Antarctica, a sovereignless region without civil tort law,[2] is a

[1]The facts of this case, as stipulated by the parties, are provided in Exhibit A to the district court's opinion. *Smith*, 702 F. Supp. at 1483-84.

[2]"Antarctica can properly be characterized as something of an international anomaly." *Beattie v. United States*, 756 F.2d 91, 93 (D.C. Cir. 1984). Under various theories of ownership, seven countries (Argentina, Australia, Chile, France, Great Britain, New Zealand, and Norway), have asserted claims to approximately eighty percent of the continent. *See* Bederman, *Exploring the Foreign Country Exception: Federal Tort Claims in Antarctica*, 21 Vand. J. Int'l L. 731, 754-55 & nn.121-25 (1988). These claims, however, are suspended by the terms of the Antarctica Treaty, 12 U.S.T. 795, T.I.A.S. No. 4780, 402 U.N.T.S. 71 (Dec. 1, 1959), to which the United States is party. Article 4 of the Treaty states that while the treaty is in force no act shall "constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica." *Id.* at art IV.

foreign country within the meaning of Section 2680(k).[3]

[1] The district court recognized that the words "foreign country" are not self-defining and determined that Congress did not intend to waive sovereign immunity for torts alleged to have been committed by government employees outside the territorial jurisdiction of the United States. We agree.

The FTCA does not define the term "foreign country." *See* 28 U.S.C. §§ 1271 & 2680(k) (1982). *See also Fernandez v. Brock*, 840 F.2d 622, 632 (9th Cir. 1988) (the starting point in determining Congress's intent is the language itself). Moreover, as we have acknowledged, the term "foreign country" is capable of different meanings. *Meredith v. United States*, 330 F.2d 9, 10 (9th Cir.) ("[t]he words 'foreign country' are not words of art, carrying a fixed and precise meaning in every context"), *cert. denied*, 379 U.S. 867 (1964); *see also United States v. Spelar*, 338 U.S. 217, 223 (1949) (Frankfurter, J., concurring) (to assume that the term "foreign country" is "self-defining, not at all involving a choice of judicial judgment, is mechanical jurisprudence."); *Burnet v. Chicago Por-*

[3]It is undisputed that Smith's cause of action arose from alleged acts or omissions by the United States in Antarctica. Smith's claim is not a "headquarters" claim, which typically involves an allegation of negligent guidance or conduct within the United States resulting in damage to the plaintiff in a foreign country. *Cf. Leaf v. United States*, 588 F.2d 733 (9th Cir. 1978) (recognizing the availability of headquarters claims under the FTCA).

trait Co., 285 U.S. 1, 5 (1932) ("[t]he word 'country,' in the expression 'foreign country' is ambiguous"); *Beattie*, 756 F.2d at 109-110 (Scalia, J., dissenting) (discussing the different possible definitions of the term "foreign country"). Because Congress's intent is not clear from the statute's language, we must ascertain a definition for "foreign country" that is compatible with the context and purpose of the FTCA. *Meredith*, 330 F.2d at 10 (in defining "foreign country" for purposes of the FTCA, "[i]t is necessary to consider the object of the enactment and to construe the expression 'foreign country' so as to achieve, and not defeat, its aim") (quoting *Burnet*, 258 U.S. at 7).

We are aided in our analysis by the comprehensive opinions of the D.C. Circuit in *Beattie*. Faced with this same question, the court explored the relevant legislative history and case law, and concluded that Antarctica is not a "country" and therefore, as a stateless area, could not be a foreign country. 756 F.2d at 98. The dissent shifted the focus of the inquiry from the interesting but abstract question of what is a country, to the purpose of the FTCA. *Id.* at 107 (Scalia, J., dissenting).

II

[2] We agree with the approach and conclusions of then Judge Scalia and hold that the FTCA does not apply to claims arising in Antarctica. To hold otherwise would render two other provisions of the FTCA nonsensical and require us to create rules governing liability for tortious acts and omissions in Antarctica. *See Central Mont. Elec. Power Co-op., Inc. v. Administrator, Bonneville Power Admin.*, 840 F.2d 1472, 1478 (9th Cir. 1988) (we "avoid any statutory interpretation that renders any section superfluous and does not give effect to all of the words used by Congress"); *Hughes Air Corp. v. Public Util. Com'n*, 644 F.2d 1334, 1338 (9th Cir. 1981) (it is a "basic rule of statutory construction that one provision should not be interpreted in a way which is internally contradictory or that renders other provisions of the same statute inconsistent or meaningless").

[3] The venue provision of the FTCA provides that a tort claim against the United States "may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred." 28 U.S.C. § 1402(b) (1982). As Judge Scalia wrote in his dissent:

> If, as the appellees assert, 'foreign country' means only 'foreign state,' and sovereign immunity has therefore been waived with respect to torts occurring in stateless regions such as Antarctica, then the venue provision for those regions makes no sense . . .

Beattie, 756 F.2d at 110 (Scalia, J., dissenting). While Smith, as the personal representative of a deceased victim, is able to lay venue in her state of residence because it has a district court, venue would not exist if the plaintiff happened to reside outside the United States. If we were to find that Antarctica is not a foreign country, a resident of New Zealand, or of any other country,[4] injured by the acts or omissions of a U.S. employee in Antarctica, would find sovereignty waived but no venue in which to proceed against the United States.[5] It is

[4] In *Spelar*, the Court noted that the original draft of the "foreign country" exception "exempted all claims 'arising in a foreign country in behalf of an alien' [but that] at the suggestion of the Attorney General, the last five words were excised . . . so that the exemption [did not] turn upon 'the fortuitous circumstances of the injured party's citizenship.'" 338 U.S. at 220 (quoting Hearings, H.R. 5373 and H.R. 6463, 77th Cong., 2d Sess., 29, 35, 66). The United States is thus open to suit by foreign citizens under the FTCA.

[5] The D.C. Circuit was able to avoid this problem in *Beattie*, where the plaintiffs were residents of Great Britain and New Zealand, through the concept of "pendent venue" because the plaintiffs also sought relief under a "headquarters" claim alleging damages resulting from the negligence of U.S. officers in Washington, D.C. *Beattie*, 756 F.2d at 100-04. The lack of venue problem cannot be so easily avoided in many cases, however.

unlikely that Congress intended to create a tort remedy in cases for which no venue exists.

[4] A further indication that the FTCA was not intended to apply in Antarctica is the choice-of-law problem presented in extending the Act's provisions to that region. The statute imposes liability "in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b) (1982). *See also Richards v. United States*, 369 U.S. 1, 9 (1962) ("We believe that it would be difficult to conceive of any more precise language Congress could have used to command application of the law of the place where the negligence occurred than the words it did employ in the Tort Claims Act"). As a stateless area over which a number of treaty powers have specifically declined to assert claims of sovereignty, Antarctica has no tort law. *See* Antarctica Treaty, *supra* at art. IV(2); *see also Beattie*, 753 F.2d at 111 (Scalia, J. dissenting).

[5] We decline to adopt the D.C. Circuit's conclusion that because "§ 1346(b) leads the court to a place where there is no civil tort law to apply" the court must use its own choice-of-law rules to determine which law applies. *Beattie*, 756 F.2d at 104-05. *See Ducey v. United States*, 713 F.2d 504, 508 n.2 (9th Cir. 1983) (in applying "the law of the place where the act or omission occurred" pursuant to section 1346(b), the whole law "including the choice of law principles" apply) (citing *Richards*, 369 U.S. at 11). We agree instead with Judge Scalia's conclusion that this choice-of-law dilemma evidences "that the FTCA no more envisions suits for torts occurring in stateless foreign regions than it does suits for torts occurring in foreign sovereignties." *Beattie*, 756 F.2d at 111 (Scalia, J., dissenting).

[6] In a case arising out of an act occurring in the United States Embassy in Bangkok, we held that the foreign country exception precluded the action, adding by way of obiter that: "No authority has been cited indicating that it is the duty of the federal courts to create rules governing liability for tortious acts and omissions on the premises of American embassies and consulates abroad . . . and obviously our embassy at Bangkok has no tort law of its own." *Meredith*, 330 F.2d at 10 (citations omitted). Likewise, while the United States conducts activity in Antarctica, both through instrumentalities of space and defense agencies and through private contractors who employ workers and provide for on-the-job injuries, we have been cited to no legislative history which suggests that the federal courts should create substantive or choice-of-law rules governing liability for tortious acts and omissions in Antarctica.

III

[7] Even if we were to adopt the view that Antarctica is not a foreign country, we still could not agree that the coverage of the FTCA extends to Antarctica. The FTCA was, and remains, a limited relinquishment by Congress of the common law immunity the United States enjoyed from tort claims. If the search for legislative intent begins with the objective of enlarging the pool of solvent defendants for plaintiffs who think "someone ought to pay" for a particular loss, then the focus of the dissent on Oregon tort law would favor extraterritoriality in cases such as this. If however, the search for legislative intent begins where it started, with sovereign immunity, then it is difficult to reach the conclusion that Congress intended to apply state tort law to claims against the government arising out of governmental presence in Antarctica. At least such intent is far from explicit.

IV

In sum, we are not persuaded that Congress intended to waive immunity for alleged torts occurring in Antarctica, and accordingly we do not need to reach other questions that might arise if the district court had denied the motion and allowed the case to proceed to another stage of litigation.

The decision of the district court to dismiss this case for lack of subject matter jurisdiction is

AFFIRMED.

FLETCHER, Circuit Judge, dissenting:

The majority concludes that Antarctica, a "sovereignless region without civil tort law," *ante* at 16934, represents a foreign country for purposes of the Federal Tort Claims Act (FTCA), and hence that plaintiff Sandra Jean Smith's suit is barred by Section 2680(k) of the Act, under which the United States has retained its sovereign immunity against claims "arising in a foreign country." 28 U.S.C. § 2680(k) (1982). I respectfully dissent because the majority pays insufficient attention to the purposes underlying the FTCA and its foreign country provision and ignores the sound reasoning of the D.C. Circuit in *Beattie v. United States*, 756 F.2d 91 (D.C. Cir. 1984), the only other circuit court case to address the FTCA's applicability to claims arising in Antarctica.

I agree with the majority that since Congress did not define what it meant by the term "foreign country" in enacting Section 2680(k), "we must ascertain a definition for 'foreign country' that is compatible with the context and purpose of the FTCA." *Ante* at 16936. After correctly identifying the task at hand, however, the majority devotes not a single line to a consideration of the FTCA's purpose or that of its foreign country provision. It instead focuses on two other provisions of the FTCA which it asserts would be rendered "nonsensical," *ante* at 16936, were we to hold that the district court enjoyed subject matter jurisdiction over the plaintiff's claims in this case. The majority's approach causes it to overstate greatly the implications of construing Antarctica as something other than a foreign country and leads it to a conclusion inconsistent with the fundamental underpinnings of the FTCA.

I.

Congress' purpose in enacting the FTCA is evident from the terms of the statute. "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . ." 28 U.S.C. § 2674 (1982). As this language makes clear, the FTCA was "designed primarily to remove the sovereign immunity of the United States . . . [and] to render the Government liable in tort as a private individual would be . . . ." *Richards v. United States*, 369 U.S. 1, 6 (1962); *see also Rudelson v. United States*, 602 F.2d 1326, 1333 (9th Cir. 1976). Congress sought to create in the federal government a responsibility for its actions akin to that borne by the average citizen.

In certain contexts, however, Congress was unwilling to subject the United States to liability in tort. Thus, in Section 2680(k), it declined to waive the federal government's immunity with respect to claims arising in foreign countries. The reasoning underpinning this exception to the FTCA's general waiver of sovereign immunity was explained by the Supreme Court in *United States v. Spelar*, 338 U.S. 217 (1949), its only decision to address Section 2680(k). "In brief, though Congress was ready to lay aside a great portion of the sovereign's ancient and unquestioned immunity from suit, it was unwilling to subject the United States to liabilities depending upon the laws of a foreign power." *Id.* at 221 (1949).

In accordance with its desire to render the government's tort liability coextensive with that of a private individual, Congress provided in the FTCA that the district courts have jurisdiction over actions against the United States in circumstances where the government, "if a private person, would be liable to the claimant in accordance with the law of the place

where the act or omission occurred." 28 U.S.C. § 1346(b) (1982). If not limited, the FTCA's invocation of the law of the place where a tort occurs, could extend the district courts' jurisdiction to claims arising out of the government's activities in other countries. The United States would find itself subject to liability under the laws of a foreign sovereign, a result which Congress understandably desired to avoid. It was for this reason, as the Supreme Court recognized in *Spelar*, that Congress enacted Section 2680(k). This circuit has reiterated *Spelar*'s understanding of the foreign country exception on numerous occasions. *See, e.g, Cominotto v. United States*, 802 F.2d 1127, 1129 (9th Cir. 1986) ("Th[e] [foreign country] provision was included because Congress did not want to subject the United States to suits under the laws of foreign powers."); *Meredith v. United States*, 330 F.2d 9, 10 (9th Cir.), *cert. denied*, 379 U.S. 867 (1964); *Cobb v. United States*, 191 F.2d 604, 609 (9th Cir. 1951), *cert. denied*, 342 U.S. 913 (1952); *see also Beattie*, 756 U.S. at 196.

In this case, however, the plaintiff has not sued the government on the basis of actions taking place in a country that possesses a civil tort law of its own. As the majority recognizes, Antarctica is a sovereignless territory that has no legal system. Thus we are presented with a situation in which an American plaintiff has sued her government because of its activities in a region that has no independent body of legal principles which might govern the suit. Congress' concern, evidenced in Section 2680(k), that extending the FTCA's waiver of sovereign immunity to claims arising in foreign countries would subject the federal government to the laws of those countries simply is not implicated under these circumstances. And, as the majority recognizes, nothing in the language of Section 2680(k) itself dictates that a suit such as the present one be deemed barred. The principal purpose of the FTCA in establishing a liability for the United States akin to that of a private citizen should thus control our analysis. The question we should ask is whether an individual might be held liable for acts or omissions akin to those allegedly engaged in by the

government and its employees in this case. This is a question which the majority never reaches.

II.

Without ever considering the purposes of the FTCA or of its foreign country exception, the majority determines that Section 2680(k)'s reservation of sovereign immunity necessarily must extend to claims arising in Antarctica. Any other conclusion, it declares, would render the FTCA's venue and choice of law provisions senseless. This is simply not so. The majority correctly notes that the FTCA's venue clause provides that "a tort claim against the United States 'may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred.' " *Ante* at 16937 (quoting 28 U.S.C. § 1402(b) (1982)). This provision, the majority declares, would make no sense were we to hold that Antarctica is not a foreign country for purposes of Section 2680(k). For in that case a plaintiff who did not reside in a judicial district within the United States would have no venue for a claim against the government for tortious conduct in Antarctica, even though the government had waived its sovereign immunity to suit for such a tort.

While it is certainly true that if a non-resident of the United States filed a tort claim against the United States arising from its actions in Antarctica, she would not be able to obtain venue pursuant to Section 1402(b), that fact alone does not justify reading Section 2680(k) so as to preclude all suits against the government that stem from its activities in Antarctica. No legal principle I know of guarantees that a plaintiff who can assert a claim over which a federal court would enjoy subject matter jurisdiction is entitled to a forum in which to bring suit. As the Supreme Court noted in *Brunette Machine Works v. Kockum Industries*, 406 U.S. 706, 710 n.10 (1972), throughout the history of our judicial system there have existed situations "in which the federal courts have juris-

diction but there is no district in which venue is proper." These situations are not frequent, nor are they favored. But the possibility that a gap between subject matter jurisdiction and venue might exist simply does not warrant reading a statute so as to eliminate jurisdiction over a class of cases altogether. Those who have no problem with venue should not be foreclosed from bringing suit simply because others cannot, particularly with respect to a statute such as the FTCA the primary purpose of which, as we have seen, was to expand the jurisdiction of the federal courts.

The FTCA's venue provision poses no difficulties in the present case. Plaintiff Smith resides in Oregon. Under the explicit terms of Section 1402(b), then, she can file suit in the District of Oregon. She should not be prevented from doing so by a reading of the statute predicated on neither its language nor its purpose, but only on the possibility that in what is surely an extremely limited number of cases a resident of a non-United States jurisdiction claiming to have been injured by the activities of the United States government in Antarctica will be unable to obtain venue for her action.

Similarly, the choice of law provision contained in Section 1346(b) of the FTCA does not support the majority's determination that Antarctica is a foreign country for purposes of Section 2680(k). Section 1346(b) requires courts to apply the whole law of the place where a negligent governmental act occurs, including that place's choice of law rule. *See Richards v. United States*, 369 U.S. 1 (1962); *Beattie*, 756 F.2d at 104. Antarctica, of course, possesses no such law, and the majority quickly draws from this fact the conclusion " 'that the FTCA no more envisions suits for torts occurring in stateless foreign regions than it does suits for torts occurring in foreign sovereignties.' " *Ante* at 16938 (quoting *Beattie*, 756 F.2d at 111 (Scalia, J., dissenting)). As the *Beattie* court observed, however, Antarctica presents "a situation *directly opposite* to the fear of becoming entangled in foreign law, which produced the 'foreign country' exception. Hence . . . we do not

feel that the logical conclusion to be derived therefrom is that the entire case ought to be dismissed." 756 F.2d at 105 (emphasis in original). That Antarctica is a sovereignless territory devoid of civil law does not present this Court with only those options considered by the majority — developing our own substantive and choice of law rules to determine the government's liability for torts committed in the region or of dismissing suits for such liability altogether. If we keep in mind the primary purpose of the FTCA, a third alternative comes to the fore. To determine whether the district court enjoyed subject matter jurisdiction over the plaintiff's claims in this case we must consider what the liability of an individual citizen would be under like circumstances. This is an inquiry which is likely to point us in the direction of well-understood common law principles. Thus we return to the question of private liability, an issue never considered by the majority.

III.

If this case involved a private defendant, a court likely would apply the choice of law rule of the forum state, Oregon, in ascertaining the principles of law that should govern its determination of liability. No other state has a closer connection to Ms. Smith's claim than Oregon, the state of her residence. Oregon, furthermore, contains the only federal judicial district in which venue over the plaintiff's action is proper. Because Antarctica has no tort law, there exists no conflict of laws in this case, and hence Oregon's choice of law rule likely would counsel the application of Oregon substantive law to this dispute.

Furthermore, no policy or principle would prevent Oregon from applying its tort law in this fashion. Oregon's capacity to apply its law extraterritorially depends, in the first instance, on the capacity of the United States to do so. While nations generally apply their law based on territorial jurisdiction, nationality is another well-recognized basis for asserting juris-

diction. In Justice Holmes' words, "in regions subject to no sovereign, like the high seas, ... countries may treat some relations between their citizens as governed by their own law ...." *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 355-56 (1909). In other words, where it would not interfere with the sovereignty of another nation, the United States can apply its law based on the nationality of the parties involved.

This approach accords with the Restatement (Third) of the Foreign Relations Law of the United States (1987) [Restatement]. According to the Restatement, a country may exercise jurisdiction to prescribe, adjudicate, and enforce its law based on the parties' nationality, subject to the requirement that such an exercise of jurisdiction is reasonable. Restatement §§ 402, 421, 431. American courts, and this Court in particular, have identified comity as the central principle behind the reasonableness requirement. *See* Restatement § 403 comment (a) (citing *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976)). It would thus be reasonable for the United States to exercise jurisdiction over a tort claim involving its nationals in Antarctica, because no other nation would have a basis for jurisdiction, and as a result the principle of comity would not be disturbed.

Where the United States can apply its law extraterritorially, an individual state such as Oregon may do the same so long as it does not run afoul of the constitutional principle of federalism. In *Old Dominion Steamship Co. v. Gilmore*, 207 U.S. 398 (1907), the Supreme Court held that Delaware could apply its wrongful death statute to a claim for death on the high seas, on the ground that both of the parties involved were Delaware corporations. The Court noted that "the bare fact of the parties being outside the territory, in a place belonging to no other sovereign, [does] not limit the authority of the state ...." *Id.* at 403. Oregon similarly has the authority to apply its tort law to a claim that has been brought by one of its residents concerning injuries sustained in an accident in Antarctica, a place which like the high seas belongs to no other sovereign.

Oregon could thus legitimately apply its tort law to a claim akin to plaintiff Smith's if the defendant were a private individual or entity. Whether the state would actually do so is, of course, a question of state law. It is substantially the same question as that which confronts a district court in every FTCA suit: Would a private individual be liable under like circumstances? I believe that this is the question we should pose to the district court on remand in order that it determine whether Ms. Smith is entitled to pursue her claim against the United States for the death of her husband. We should not affirm the district court's dismissal for lack of subject matter jurisdiction.

As the D.C. Circuit noted in *Beattie*, "we [would] have a no-man's land of law in Antarctica, unless United States law covers the actions of United States citizens — not an unfair concept — and United States law includes the Federal Tort Claims Act ... [U]nless this concept is accepted, Antarctica is an area without any law whatsoever." 756 F.2d at 105-06. The majority's decision in this case essentially renders lawless a region where many of our citizens live and work. Since neither the language of the FTCA nor its underlying principles justify this result, I respectfully dissent.

Sandra Jean SMITH, Plaintiff,

v.

UNITED STATES of America, Defendant.

Civ. No. 87-883-FR.

United States District Court, D. Oregon.

Jan. 6, 1989.

OPINION

FRYE, District Judge.

In the matter before the court, defendant, United States of America, moves the court for an order dismissing plaintiff, Sandra Jean Smith's, complaint pursuant to Rules 12(b)(1) and 12(h)(3) of the Federal Rules of Civil Procedure on the basis that the court lacks jurisdiction over the subject matter of the action.

BACKGROUND

The agreed facts are set forth in Exhibit A of the Pretrial Order attached hereto.

Plaintiff brings this wrongful death action invoking the court's subject matter jurisdiction pursuant to the Federal Torts Claims Act, 28 U.S.C. §§ 1346(b), 2671 et seq. (FTCA). Plaintiff asserts that the United States negligently caused her husband's death by failing to adequately warn

him that there were dangerous crevasses in areas off the flagged paths.

[1] In order to establish jurisdiction under the FTCA, plaintiff has the burden to demonstrate that her case falls within the parameters described by 28 U.S.C. § 1346(b) and that it does not fall within any of the FTCA's exceptions to the limited waiver of sovereignty by the United States.

The United States asserts that this court does not have subject matter jurisdiction over plaintiff's claim which arose in Antarctica because 1) the FTCA was meant to apply only within the territorial jurisdiction of the United States; 2) Antarctica is a "foreign country" as that term was used by Congress when it explicitly retained the government's sovereign immunity for

"[a]ny claim arising in a foreign country," 28 U.S.C. § 2680(k); and 3) plaintiff cannot demonstrate "circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred," 28 U.S.C. § 1346(b), because Antarctica has no civil law.

Plaintiff asserts that the FTCA was intended to apply to a foreign country without a government and without laws, and that the FTCA does not limit the liability of the United States to acts occurring within the territorial boundaries of the United States.

ANALYSIS AND RULING

The FTCA acts as waiver of sovereign immunity in specified types of cases. Section 2680 of the FTCA lists several exceptions to that waiver. Section 2680 provides that "[t]he provisions of this chapter and section 1346(b) of this title shall not apply to ... (k) [a]ny claim arising in a foreign country." Plaintiff's claim arose in Antarctica and is barred if Antarctica is a "foreign country" within the meaning of the FTCA.

[2] The provision against the extraterritorial application of the FTCA in section 2680(k) is consistent with an important canon of statutory construction that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285, 69 S.Ct. 575, 577, 93 L.Ed. 680 (1949). The presumption against the extraterritorial application of a statute is not absolute in that it can be overcome by "a clear expression of congressional intent." *United States v. Mitchell*, 553 F.2d 996, 1002 (5th Cir.1977); *see also Foley*, 336 U.S. at 285, 69 S.Ct. at 577.

In *Meredith v. United States*, 330 F.2d 9 (9th Cir.1964), the court held that an action arising from acts and omissions which occurred within the physical confines of the American Embassy at Bangkok, Thailand was barred by the foreign country exception in section 2680(k). The Ninth Circuit

stated that "[t]he phrase 'in a foreign country' is used in section 2680(k) with the meaning dictated by 'common sense' and 'common speech.'" *Meredith*, 330 F.2d at 11 (citations omitted). The court stated that the appellant's position that the FTCA was intended to extend to persons injured on premises occupied by foreign embassies and consulates of the United States is "incompatible with the rule that, in the absence of an indication to the contrary, legislation is intended to apply 'only within the territorial jurisdiction of the United States.'" *Meredith*, 330 F.2d at 11 (citations omitted).

[3, 4] This court finds nothing in the FTCA that would indicate that Congress intended for the FTCA to apply to acts or omissions which arose in Antarctica. The common sense and common speech meaning of the phrase "in a foreign country" used in section 2680(k) includes Antarctica in that it is not within the territorial jurisdiction of the United States. There is no

indication that Congress intended to exclude from the common sense meaning of the phrase "in a foreign country" regions that while not within the territorial jurisdiction of the United States, are not under the domination of another foreign nation or country, assuming for the sake of argument that Antarctica can be considered to be governless.

Furthermore, to apply the FTCA to torts occurring in stateless foreign regions would lead to unnecessary inconsistencies within the provisions of the FTCA itself. The choice of law provision of the FTCA reads, in relevant part, as follows:

> [T]he district courts ... shall have exclusive jurisdiction of civil actions on claims against the United States ... under circumstances where the United States, if a private person, would be liable to the claimant *in accordance with the law of the place where the act or omission occurred.*

28 U.S.C. § 1346(b) (1982) (emphasis added).

The Supreme Court has made clear that a court should apply this language precisely as it appears:

> In the Tort Claims Act Congress has expressly stated that the Government's liability is to be determined by the application of a particular law, the law of the place where the act or omission occurred, and we must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used. We believe that it would be difficult to conceive of any more precise language Congress could have used to command application of the law of the place where the negligence occurred than the words it did employ in the Tort Claims Act.

Richards v. United States, 369 U.S. 1, 9, 82 S.Ct. 585, 591, 7 L.Ed.2d 492, (1962) (footnote omitted).

[5] To adopt the plaintiff's position would require this court to apply the civil law of Antarctica which has no civil law to apply. This court would then have to bypass the "precise language," *Richards*, 369 U.S. at 9, 82 S.Ct. at 591, of Congress and apply the law of a place where all parties acknowledge the negligence did *not* occur.

This court acknowledges that the Circuit Court for the District of Columbia reached a contrary conclusion in *Beattie v. United States*, 756 F.2d 91 (D.C.Cir.1984), holding that the exception in section 2680(k) applies only where "the government of a foreign nation has or asserts sovereignty" and not to Antarctica which "is not a country at all." *Beattie*, 756 F.2d at 94. However, this court concludes that the precedent set in *Meredith* supports the dissenting opinion in *Beattie*. The *Meredith* case supports the conclusion that section 2680(k) is properly interpreted to limit the application of the FTCA to the territorial jurisdiction of the United States. *Meredith*, 330 F.2d at 11. This interpretation is dictated by the fact that there is no clear expression of congressional intent in the FTCA to apply the legislation outside of the territorial boundaries of the United States, and it avoids the creation of internal inconsistencies within the precise language of the statute.

The United States's motion to dismiss on the grounds that this court lacks subject

matter jurisdiction over this action is granted.

EXHIBIT A

The following facts are agreed to by the parties and require no further proof:

1. Plaintiff resides at 14222 N.E. Milton, Portland, Oregon.

2. Plaintiff Sandra Jean Smith is the widow of and the duly appointed personal representative of the estate of John Emmett Smith, deceased (sometimes referred to as "decedent").

3. Prior to filing suit, plaintiff Sandra Jean Smith timely presented an administrative claim to the appropriate federal agency in her capacity as personal representative of the estate of John Emmett Smith.

4. Plaintiff's administrative claim was finally denied by the agency in writing on or about July 13, 1987.

5. Plaintiff commenced suit within six months after the date of mailing of the letter denying the administrative claim she had filed.

6. Plaintiff's complaint seeks money damages on behalf of her husband's estate for his personal injury and death.

7. Commencing on or about October 21, 1986, decedent was employed by ITT Antarctic Services, Inc. ("ITT/ANS"), as a carpenter.

8. Mr. Thomas Powell and Mr. Matthew Kaz were also employed by ITT/ANS.

9. Decedent was assigned by ITT/ANS to help construct buildings at McMurdo Station, which is on Ross Island, Antarctica.

10. Decedent arrived at McMurdo Station, Antarctica, on October 27, 1986.

11. Mr. Powell and Mr. Kaz also arrived at McMurdo Station, Antarctica, on October 27, 1986.

12. Upon arrival at McMurdo Station on October 27, 1986, Mr. Smith, Mr. Powell, and Mr. Kaz attended an indoctrination briefing. The speakers at the briefing were Art Brown, an employee of ITT/ANS, and David M. Bresnahan, an employee of the National Science Foundation ("NSF").

13. At the briefing, Mr. Brown and/or Mr. Bresnahan noted that Antarctica is a dangerous place, and that it was important to remember that fact and not to be lulled into a sense of security.

14. The briefing also covered, among other topics, the requirement to file a foot plan when participating in off-base recreational travel.

15. The National Science Foundation and the Department of the Navy are agencies of the United States and their employees are federal employees for purposes of the FTCA.

16. ITT Antarctic Services, Inc., is not an agency of the United States and its employees are not federal employees for purposes of the FTCA.

17. The United States maintains a presence in Antarctica responsive to the United States' scientific, economic, and political objectives.

18. The NSF has responsibility for the United States' research effort in Antarctica. In 1959 it established the U.S. Antarctic Research Program ("USARP"). Budgetary responsibility for the program, including the funding of logistic support activities, rests with the NSF.

19. The NSF draws upon the logistic support capabilities of the Department of the Navy in operating the United States Antarctic Research Program.

20. The NSF has contracted with ITT/ANS for construction and other specialized functions at McMurdo Station, as well as for services at other locations in Antarctica.

21. McMurdo Station is the primary logistics facility for airborne resupply of inland stations and for USARP field science projects in Antarctica.

22. Both the United States Navy and ITT/ANS provide various services and operate and maintain facilities and utilities at McMurdo Station and its airfield, Williams Field.

23. Castle Rock is located outside McMurdo Station.

24. The Castle Rock hike route and the area where Mr. Smith fell into a crevasse were not depicted on the map posted outside the galley.

25. The United States neither owns nor exercises sovereignty over the area where Mr. Smith fell into a crevasse.

26. One of the contractual conditions of Mr. Smith's employment with ITT/ANS required him to comply with all laws and regulations, both civil and military, applicable at the work site and the vicinity thereof.

27. One of the conditions applicable to Mr. Smith and his hiking companions was compliance with "COMNAVSUPPFORANTARCTICA INSTRUCTION 5101.2," which sets forth off-base travel procedures in Antarctica.

28. Off-base recreational travel governed by "COMNAVSUPPFORANTARCTICA INSTRUCTION 5101.2," includes travel to Castle Rock.

29. Mr. Smith and his companions Mr. Powell and Mr. Kaz took a recreational hike to Castle Rock on November 23, 1986.

30. The hike to Castle Rock was marked by a flagged route. There were no black flags on or off the flagged route.

31. Mr. Smith and his companions filed a foot plan as required by "COMNAVSUPPFORANTARCTICA INSTRUCTION 5101.2."

32. Mr. Smith and his companions did not seek nor did they obtain permission to deviate from the flagged route to Castle Rock.

33. No signs are posted at the beginning of the flagged route to Castle Rock, or along the path, advising hikers not to leave the flagged route and/or that there were crevasses in the area if they travelled off the flagged route.

34. On their way to Castle Rock, Mr. Smith and his companions hiked along the flagged route.

35. Mr. Smith and his companions hiked along the flagged route part of the way back to McMurdo Station. Then they broke away from the flagged route to hike

across a snow field in the direction of Scott Base.

36. Scott Base is a New Zealand base which is located near to McMurdo Station.

37. Sometime after deviating from the flagged route, Mr. Smith and his companions reached an area where the downward slope of the ground was about 10–15 degrees. They crossed an obvious crack in the snow which was solidly filled in. This was a crevasse. Mr. Kaz warned Mr. Smith and Mr. Powell to be careful of such cracks.

38. While walking across the unflagged snow field, Mr. Smith and Mr. Powell dropped into snow above their knees, but this did not cause them to turn back or return to the flagged route.

39. Mr. Smith and his companions did not walk in single file while walking across the snow field.

40. Mr. Smith and his companions did not rope themselves together while walking across the snow field.

41. Mr. Smith and his companions did not encounter any other hikers walking across the snow field. Nor did they see any footprints in the snow.

42. After stopping for a snack, Mr. Kaz took a step and suddenly disappeared from sight.

43. Mr. Smith then took another step and he disappeared from sight.

44. Both Mr. Kaz and Mr. Smith had fallen into a crevasse.

45. Mr. Smith died from exposure and/or internal injuries suffered as a result of the fall.